No. 14-1280

DEC 23 2015

In the Supreme Court of the United States

JEFFREY J. HEFFERNAN,

Petitioner,

v.

CITY OF PATERSON, NEW JERSEY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES, AND NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

Amici are not-for-profit organizations whose mission is to advance the interests of state and local government officials and thereby ensure the smooth functioning of state and local government. *Amici* monitor and analyze legal developments that have a distinct impact on the business of state and local governments, and they take positions advocating for greater protection of government officials as they serve the public good.

The National Conference of State Legislatures ("NCSL") is a bipartisan organization that serves the legislators and staffs of the Nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits amicus briefs to this Court in cas-

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[1] No counsel for any party authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Both Petitioner and Respondents have filed a blanket consent with this Court to the filing of all *amicus* briefs.

es, like this one, that raise issues of vital state concern.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

National League of Cities ("NLC") is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of over 9,000 ap-

pointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association ("IMLA") is a non-profit, nonpartisan professional organization consisting of more than 2,500 members. The membership is comprised of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

The International Public Management Association for Human Resources ("IPMA-HR") rep-

resents human resource professionals and human resource departments at the federal, state, and local levels of government. IPMA-HR was founded in 1906 and currently has over 8,000 members. IPMA-HR promotes public-sector human resource management excellence through research, publications, professional development and conferences, certification, assessment, and advocacy.

The National Public Employer Labor Relations Association ("NPELRA") is a national organization for public sector labor relations and human resources professionals. NPELRA is a network of state and regional affiliations, with over 2,300 members, that represents agencies employing more than 4 million federal, state, and local government workers in a wide range of areas. NPELRA strives to provide its members with high quality, progressive labor relations advice that balances the needs of management and the public interest, to promote the interests of public sector management in the judicial and legislative areas, and to provide networking opportunities for members by establishing state and regional organizations throughout the country.

This case directly impacts the interests of *amici* and their members. States, as well as their agencies and municipalities, are increas-

ingly burdened by the threat of litigation arising from First Amendment claims brought by government employees. State and local governments are collectively one of the nation's largest employers and will be faced with significant unanticipated and unbudgeted costs if the decision below is reversed. *Amici* have a strong interest in ensuring that state and local government employers are able to effectively manage their workplaces, and the Third Circuit's decision supports their ability to do so.

SUMMARY OF ARGUMENT

The undersigned *amici* urge that the Court resist Petitioner's invitation to constitutionalize what amounts to an employee grievance. No constitutionally protected activity occurred in this case. A government employer's mere *perception* that an employee has exercised his First Amendment rights is not equivalent to the employee's actual exercise of those rights. *See* Resp. Br. 8-12.

There are multiple alternate remedies, discussed in detail below, available to such an employee. A web of statutory remedies exists, each of which enjoys innate flexibility and adaptability to voters' evolving views. These include collective bargaining statutes, "just cause" protections, civil service statutes, and statutes protect-

ing against interference or *attempts* to interfere with any individual's civil rights. In addition, many states recognize the availability of a common-law remedy when no other remedies are available: the tort of wrongful discharge in violation of public policy. There is therefore no need to distort First Amendment doctrine to cover the mere perception of constitutionally protected activity when no such activity, in fact, occurred.

Moreover, the Court has long held that a governmental entity may restrict its employees from engaging in political activity in certain circumstances. *See, e.g., United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973). Lower courts have held that the *Elrod-Branti-Rutan* exception to the First Amendment, which applies to various adverse employment actions taken against a government employee if party affiliation is an appropriate requirement for the effective performance of his or her public office, *Rutan v. Republican Party*, 497 U.S. 62, 75 (1990), may also apply to employees whose positions require a heightened need for trust and confidence. If the Court *were* to determine that the First Amendment covers *perceived* First Amendment violations (which it should not), it should then analyze whether a sensitive and confidential position such as that

held by Petitioner should fall within the *Elrod-Branti-Rutan* exception. But the Court need not, and should not, reach that question for all the reasons discussed in Respondent's Brief and in light of all the alternate remedies discussed below.

ARGUMENT

I. THE COURT SHOULD REJECT PETITIONER'S STRAINED ATTEMPT TO EXPAND THE FIRST AMENDMENT IN LIGHT OF THE OTHER PROTECTIONS AVAILABLE TO GOVERNMENT EMPLOYEES.

An assortment of non-Constitutional remedies is available to address an adverse employment action taken by a government employer against its employee due to the employer's *mistaken* belief that the employee exercised his First Amendment rights. *See Waters v. Churchill*, 511 U.S. 661, 670 (1994) ("[N]ot every procedure that may safeguard protected speech is constitutionally mandated."). Collective bargaining agreements, codes, and reporters contain statutory and common-law remedies that serve to protect a government employee in such a circumstance. Statutory remedies also enjoy flexibility to adapt to the changing interests advanced by the public through their elected representatives. Inasmuch as the Court's "usual

practice is to avoid the unnecessary resolution of constitutional questions," *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009), and other remedies exist, the Court should reject Petitioner's request for a new, analytically incoherent, constitutional cause of action.

A. Government Employees Enjoy Statutory Protections.

Most public employees are protected by statutory procedures applicable to their jurisdictions. Most states authorize collective bargaining for state and local government authorities. Either through such agreements or through statutory protection, most state and local government employees may not be disciplined or terminated but for just cause. It seems unlikely that an arbitrator or a personnel review board would conclude that an employer's misperception of anything, much less employee political speech, amounts to "just cause."

1. Collective Bargaining Laws

Collective bargaining laws enable employees to negotiate appropriate employment protection tailored to their experience with and understanding of their work environment. Unlike the First Amendment, which is effectively invoked

in the employment context only in a circumscribed set of circumstances, collective bargaining statutes are written and enacted with the express purpose of safeguarding employees' rights in the workplace. The resulting collective bargaining agreements can and do provide employees with ample resources to prevent, contest, and seek full remedy for unjust adverse employment actions.

The vast majority of states and the District of Columbia, as well as many municipalities, have enacted some form of public sector collective bargaining laws which require public employers to negotiate with their employees over the terms and conditions of their employment, affording employees the opportunity to protect themselves against unjust adverse employment actions. *See, e.g.*, ALASKA STAT. § 23.40.070, *et seq.* (Public Employment Relations Act) (requiring public employers to negotiate with and enter into written agreements with employee organizations on terms and conditions of employment); *id.* § 42.40.720, *et seq.* (collective bargaining rights for employees of the Alaska Railroad Corporation); CONN. GEN. STAT. § 7-467, *et seq.* (collective bargaining rights for municipal employees); *id.* § 5-270, *et seq.* (collective bargaining for state employees); *id.* § 10-153a, *et seq.* (codifying teachers' bargaining rights, including

over terms and conditions of employment); DEL. CODE ANN., tit. 19, §§ 1301-1319 (Public Employment Relations Act) (securing bargaining rights for public employees over terms and conditions of employment and establishing review board to resolve disputes arising between public employees and employers); *id.* §§ 1601 1618 (Police Officers' and Firefighters' Employment Relations Act) (granting firefighters and policemen right to organization and representation); *id.*, tit. 14; §§ 4001-4019 (Public School Employment Relations Act) (granting school employees right to organization and representation and establishing public employment relations board to oversee disputes between school employees and boards of education); D.C. CODE §§ 1-617.01, *et seq.* (codifying public employee bargaining rights, including board with authority to reinstate or otherwise make whole the employment or tenure of any employee); GA. CODE ANN. §§ 25-5-1 to 25-5-14 (Firefighter's Mediation Act) (allowing permanent members of any paid fire department of a municipality to bargain collectively concerning wages, rates of pay, and other terms and conditions of employment); HAW. REV. STAT. §§ 89-1 to 89-23 (affording public employees bargaining rights over terms and conditions of employment); IDAHO CODE ANN. §§ 33-1271 to 33-1276 (empowering school district to enter into negotiation agreement with local

education organization representing at least 51% of professional employees); *id.* §§ 44-1801 to 44-1812 (firefighters' bargaining rights over working conditions and all other terms and conditions of employment); 5 ILL. COMP. STAT. ANN. §§ 315/1-315/28 (Illinois Public Labor Relations Act) (granting public employees full freedom of association to organize for purpose of negotiating conditions of employment and other mutual aid or protection); 115 ILL. COMP. STAT. ANN. §§ 5/1-5/21 (Illinois Educational Labor Relations Act) (establishing collective bargaining rights for teachers and Illinois Educational Labor Relations Board); IND. CODE § 20-29-1-1, *et seq.* (collective bargaining rights for teachers including specific right to include grievance procedure in any contract); IOWA CODE §§ 20.1, *et seq.* (Public Employment Relations Act) (establishing public employment relations board with authority to provide remedial relief for violations of the chapter, including reinstatement and back pay); KAN. STAT. ANN. §§ 75-4321 to 75-4339 (purpose of the Public Employer-Employee Relations Act is to enable "public employees and their representatives to enter into discussions with affirmative willingness to resolve grievances and disputes relating to conditions of employment"); *id.* §§ 72-5413, *et seq.* (requiring boards of education to recognize and negotiate with teachers' organization); KY. REV. STAT. §

345.010, *et seq.* (recognizing firefighters' bargaining rights related to terms and conditions of their employment and other mutual aid or protection); *id.* § 78.470, *et seq.* (county police bargaining rights); *id.* § 67C.400, *et seq.* (establishing bargaining rights for police in counties with a population of at least 300,000); *id.* § 67A.6901, *et seq.* (establishing bargaining rights for urban-county corrections personnel, firefighters, police officers); ME. REV. STAT. ANN., tit. 26, §§ 1281-1294 (Judicial Employees Labor Relations Act) (establishing collective bargaining rights for judicial employees); *id.* §§ 979 to 979-S (granting state employees collective bargaining rights over terms and conditions of employment); *id.* §§ 1021-1036 (University of Maine System Labor Relations Act) (requiring employers to confer and negotiate in good faith with respect to working conditions and contract grievance arbitration); *id.* §§ 961-974 (Municipal Public Employees Labor Relations Law) (establishing collective bargaining rights for municipal employees, including over the terms and conditions of their employment); MD. CODE ANN., STATE PERS. AND PENS. § 3-101, *et seq.* (codifying collective bargaining rights over terms and conditions of employment for state employees); *id.*, EDUC. §§ 6-401 to 6-411 (establishing collective bargaining rights over terms and conditions of employment for public school teachers); *id.* §§

6-501 to 6-510 (extending collective bargaining rights to "noncertificated" public school employees); MASS. GEN. LAWS ch. 150E, §§ 1-15 (codifying bargaining rights over terms and conditions of employment for employees of the Commonwealth and any county, city, town, district, or other political subdivision); MICH. COMP. LAWS. §§ 423.201-423.217 (Public Employment Relations) (provides collective bargaining rights for mutual aid and protection); *id.* §§ 423.231-423.246 (mandatory arbitration over labor disputes for police and firefighters); MINN. STAT. §§ 179A.01 179A.60 (Public Employment Labor Relations Act) ("establishing special rights, responsibilities, procedures, and limitations regarding public employment relationships which will provide for the protection of the rights of the public employee, the public employer, and the public at large"); MONT. CODE ANN. §§ 39-31-101 to 39-31-505 (Collective Bargaining for Public Employers) (purpose of Act is to "arrive at friendly adjustment of all disputes between public employers and their employees"); *id.* §§ 39-32-101 to 39-32-114 (extending collective bargaining rights to nurses); *id.* §§ 39-34-101 to 39-34-106 (arbitration and collective bargaining rights for firefighters); NEV. REV. STAT. §§ 288.010-288.280 (Local Government Employee-Management Relations Act) (mandating local government employers bargain with local gov-

ernment employees over terms and conditions of employment); N.H. REV. STAT. ANN. §§ 273-A.1 to 273-A.17 (Public Employee Labor Relations) (establishing collective bargaining rights for public employees and board of review); N.J. STAT. §§ 34:13A-1 to 34:13A-43 (granting collective bargaining rights for public employees including police and firemen); N.M. STAT. ANN. §§ 10-7E-1 to 10-7E-26 (Public Employee Bargaining Act) (establishing collective bargaining rights for public employees along with labor relations board); N.Y. CIV. SERV. LAW §§ 200, *et seq.* (Public Employees' Fair Employment Act) (establishing collective bargaining rights for public employees and board of review); N.D. CENT. CODE §§ 34-11.1-01 to 34-11.1-08 (Public Employees Relations Act) (codifying bargaining rights for public employees and, with limited exception, prohibiting restrictions on political activity); OHIO REV. CODE ANN. §§ 4117.01 to 4117-24 (Public Employees' Collective Bargaining) (establishing bargaining rights over terms and conditions of employment and labor board); OKLA. STAT. tit. 70, §§ 509.1-510.2 (school employees and employers must "negotiate in good faith on wages, hours, fringe benefits and other terms and conditions of employment"); OR. REV. STAT. §§ 243.650-243.782 (Public Employee Collective Bargaining Act) (requiring public employers to meet with public employees and nego-

tiate terms and conditions of employment in good faith); 43 PA. STAT. ANN. §§ 1101.101-1101.2301 (Public Employee Relations Act) (establishing collective bargaining rights and labor relations board); *id.* §§ 217.1-217.10 (police and firefighters' right to bargain collectively concerning the terms and conditions of their employment, including working conditions and the right to an adjustment or settlement of grievances or disputes); R.I. GEN. LAWS § 36-11-1, *et seq.* (right to organization for state employees for bargaining purposes over conditions of their employment); S.D. CODIFIED LAWS §§ 3-18-1 to 3-18-18 (collective bargaining rights for public employees over terms and conditions of employment and right to bring grievances regarding same); TEX. LOCAL GOV'T CODE ANN. § 174.001, *et. seq.* (The Fire and Police Employee Relations Act) (collective bargaining rights for firefighters and policemen); VT. STAT. ANN., tit. 3, §§ 901 1008 (State Employees Labor Relations Act) (providing collective bargaining rights over terms and conditions of employment for state employees); *id.*, tit. 21, §§ 1721-1736 (Vermont Municipal Employee Relations Act) (establishing same for municipal employees); WASH. REV. CODE § 41.56.010, *et seq.* (bargaining rights for public employees over terms and conditions of employment); WYO. STAT. ANN. §§ 27-10-101 to 27-10-109 (collective bargaining for

firefighters over pay, working conditions, and all other terms and conditions of employment).

Other than discrimination and retaliation prohibitions arising under labor laws, most collective bargaining statutes do not specify what rights are protected related to employee discipline and dismissal. Instead, those rights are bargained for and are contained in collective bargaining agreements. The following three concepts are contained in most collective bargaining agreements. First, the level of cause required for an adverse employment action; in most agreements, "just cause" is required. *See, e.g.*, Michael L. Wells, *Section 1983, The First Amendment, and Public Employee Speech: Shaping the Right to Fit the Remedy (and Vice Versa)*, 35 GA. L. REV. 939, 940 n.4 ("public employee unions typically negotiate rights not to be fired without just cause"). Second, most collective bargaining agreements require progressive discipline, which is often found in the "just cause" provision. For example, unless a workplace violation is particularly egregious, a verbal warning is first required, followed by a written warning, then a suspension, and finally termination. Third, most collective bargaining agreements specify procedures for reviewing adverse employment actions. Typically, employees may grieve adverse employment actions with

the benefit of union representation to a neutral arbitrator who has the authority to overturn the discipline. *See, e.g., Armstrong v. Meyers*, 964 F.2d 948, 950 (9th Cir. 1992) ("Grievance/arbitration procedures [in collective bargaining agreements] are a universally accepted method of resolving employment disputes, included in countless collective bargaining agreements.").

2. "Just Cause" Protections

Many states also provide state and local government employees with statutory protection against discipline or dismissal from employment without just cause, as well as the right to a hearing with an impartial body to contest adverse employment actions. *See, e.g.* ALASKA STAT. § 39.25.170 (right to hearing with State Personnel Board for any employee who is "dismissed, demoted, or suspended for more than thirty days"); ARIZ. REV. STAT. ANN. § 41 783 (right of appeal to the state personnel board seeking relief from dismissal from state covered service, suspension, or involuntary demotion resulting from disciplinary action); COLO. REV. STAT. §§ 24-50-125 (in Colorado, state employees have right to appeal dismissal, suspension, or other discipline to state personnel board); KY. REV. STAT. §§ 78.455, 78.460 (right to review and public hearing for "[e]very action in the

nature of a dismissal, suspension, reduction, or fine made by the chief [of police]"); NEV. REV. STAT. § 245.065 (dismissed county employees entitled to written statement and public hearing to determine the reasonableness of the action); WASH. REV. CODE § 28A.400.300 (limiting discharge of school employees to "sufficient cause").

In California, for example, the State Personnel Board implements and enforces laws governing the employment of "every officer and employee of the state." CAL. CONST. art. VII, § 1. Under article VII of California's Constitution, the Board "shall . . . review disciplinary actions." *Id.* § 3. Many municipal employees in California receive similar protection from personnel laws and boards governing their employment. *See McGraw v. Huntington Beach*, 882 F.2d 384 (9th Cir. 1989) (holding city clerk had property right in employment and reversing summary judgment for city where city charter adopted rules and regulations protecting city employees from suspension, demotion, or dismissal without just cause).

Mississippi is another example of a state with a comprehensive statute delineating the rights of state employees and establishing a State Personnel Board, responsible for promulgating rules and regulations regarding oversight

of state employees. MISS. CODE §§ 25-9-101 to 25-9-155. Pursuant to that statute, state employees cannot be "dismissed or otherwise adversely affected as to compensation or employment status except for inefficiency or other good cause." *Id.* § 25-9-127. A state service employee may also "appeal his dismissal or other action adversely affecting his employment status to the employee appeals board" and ultimately to the courts. *Id.* § 25-9-131.

Regardless of what standard a collective bargaining agreement or statute uses for discipline and discharge, regardless of whether progressive discipline is required by the contract, and regardless of whether a court, a personnel board, or an arbitrator was reviewing the employment decision, it is difficult to believe that a *mistake by the employer* could meet the standard.

3. State Civil Rights Statutes

In addition to the comprehensive protections public employees have under state collective bargaining and state and federal employee personnel laws, most states have enacted a variety of additional statutes providing causes of action for interference with civil rights, including political activity.

Some of these protections are embodied by statutes protecting against interference or *attempts* to interfere with any individual's civil rights. *See, e.g.*, CAL. CIV. CODE § 52.1 (creating a cause of action for "[a]ny individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or by rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with" by a person using threats, intimidation, or coercion); FLORIDA STAT. § 760.51 (civil liability for any person who "attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by any other person of rights secured by the State Constitution or laws of this state"); MASS. GEN. LAWS ch. 12 §§ 11H, I (cause of action for interference or "attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth"); N.J. STAT. § 10:6-2 (providing cause of action to anyone who has been deprived of due process, equal protection, substantive rights, privileges or immunities secured by the Constitution or state law, or whose exercise or enjoyment of those rights are interfered with or attempted to be interfered with, by threats, intimidation or coercion by a

person acting under color of law). Although still largely an open question, these statutes arguably provide a cause of action against government employers who *attempt* to interfere with an established right, regardless of whether the employee actually exercised that right.

For example, the Massachusetts Civil Rights Act (the "MCRA") includes a provision that prohibits any interference or *attempt* to interfere with established rights using threats, intimidation, or coercion. MASS. GEN. LAWS. ch. 12 §§ 11H, I. The statute has been invoked by individual public employees seeking a remedy for violation of constitutional rights, even where ambiguity existed regarding the nature of the right asserted.[2] In *Howcrowft v. City of Pea-*

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[2] In addition to private rights of action, the MCRA authorizes the Attorney General to bring civil actions for injunctions or other equitable relief "[w]henever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth." *Id.* § 11H. The Attorney General may do so when a "reasonable [person] would have felt threatened, intimidated, or coerced by the defendants' conduct." *Planned Parenthood League*

body, a police officer brought claims against his supervisors under both 42 U.S.C. § 1983 and the MCRA based on actions taken by his supervisor and coworkers in an attempt to stop the officer's complaints about smoking inside the police station in violation of state law. 747 N.E.2d 729, 733-38 (Mass. App. Ct. 2001). The court concluded that the officer "established a sufficient evidentiary basis to present a genuine issue whether the defendants engaged in a pattern of harassment and intimidation in an *attempt* to suppress [the officer's] free speech rights." *Id.* at 745-46 (emphasis added).

4. State Statutes Prohibiting Discrimination Based on Political Affiliation or Activity

Other states have designed statutes specifically prohibiting discrimination based on political affiliation or activity. The District of Columbia, for example, prohibits discrimination against government employees based on political affiliation. D.C. CODE. ANN. § 2-1402.11. Likewise, North Dakota prohibits discrimination when a government employee participates in lawful activity during non-work hours which

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of Mass., Inc. v. Blake, 631 N.E.2d 985, 991 (Mass. 1994).

is not in direct conflict with the essential business-related interests of the employer. N.D. CENT. CODE §§ 14-02.4-01.

In California, there is a statute in place prohibiting restrictions on firefighters' political activity when not in uniform. CAL. GOV. CODE § 3252. In New Jersey as well, permanent municipal firefighters and police officers cannot be removed from "office, employment or position for political reasons," nor can such firefighters or officers be "suspended, removed, fined or reduced in rank from or in office, employment, or position therein, except for just cause." N.J. STAT. § 40A:14-19; *see also id.* § 40A:14-147.

Most government employees thus have available to them a web of federal,[3] state, and local government protections, as well as collective bargaining agreements, that give them a

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[3] Other federal statutory protections exist but are less relevant to the facts presented in this case, such as the Whistleblower Protection Act, 5 U.S.C. §§ 1211-19, 1222, 3352; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*; the Equal Pay Act, 29 U.S.C. § 206(d); the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, *et seq.*; the Fair Labor Standards Act, 29 U.S.C. 201, *et seq.*; and Sections 501 and 505 of the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.*

right to continued employment or to protection from adverse employment actions without "cause" or absent narrowly defined circumstances.

These protections vary from state to state, reflecting their percolation through the democratic process. *See Smith v. Robbins*, 528 U.S. 259, 273 (2000) (noting the Court's "established practice, rooted in federalism, of allowing the States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy."). This presents no obstacle, because there is no reason why government employees should be afforded constitutional relief, particularly in the *absence* of the exercise of a constitutional right, when their private employee counterparts are required to rely solely on statutory relief. Moreover, legislatures remain free to enact future statutes if current protections prove inadequate.

B. The Public-Policy Exception to Employment at Will Protects Government Employees in the Absence of Other Remedies.

There are three major common-law exceptions to the employment-at-will doctrine: the public-policy exception, the implied-contract ex-

ception, and the covenant-of-good faith exception. Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, MONTHLY LABOR REVIEW 3, 4 (Jan. 2001), http://www.bls.gov/opub/mlr/2001/01/art1full.pdf.

Most states have adopted the public-policy exception to the employment-at-will rule. *See* Genna H. Rosten, Annotation, *Wrongful Discharge Based on Public Policy Derived from Professional Ethics Codes*, 52 A.L.R. 5th 405 (1997); Muhl, *supra*, at 4 (noting that in 2001, "[t]he public-policy exception is . . . recognized in 43 of the 50 States.").

The public-policy exception to employment at will applies when an employee is wrongfully discharged and the termination is against explicit, well-established State public policy. *Id.* Although the doctrine is rarely applied in the context of government employees, the Supreme Court of Washington has held that a state technical college employee could maintain a wrongful termination claim in violation of public policy. *Smith v. Bates Tech. College*, 991 P.2d 1135, 1140-41 (Wash. 2000). The court's discussion occurred in the context of determining whether the tort of wrongful discharge in violation of public policy extends to employees who are terminable only for cause. However, the fact remains that it held that the tort should be ex-

tended to "all employees," which obviously included the state employee in the case. *Id.* at 1141-43.

The Court explained, "in Washington, the tort of wrongful discharge is not designed to protect an employee's purely *private interest* in his or her continued employment; rather, the tort operates to vindicate the *public interest* in prohibiting employers from acting in a manner contrary to fundamental public policy." *Id.* at 1140 (emphasis in original). Because the tort does not arise out of contract, but "rather arises out of the employer's duty to conduct its affairs in compliance with public policy, . . . [i]t logically follows when *any* employee is terminated in violation of a clear mandate of public policy, the employee should be permitted to recover for the violation of his or her legal rights." *Id.* at 1141.

In California, the California Tort Claims Act abolishes all "common law or judicially declared forms of liability for public entities, except for such liability as may be required by the state or federal constitution . . . [or] if a statute . . . is found declaring them to be liable." CAL. GOV. CODE § 815, Legis. Comm. Comments. However, a government employee's wrongful termination in violation of public policy was allowed to go forward because the employee complied with CAL. GOV. CODE §§ 910 & 945.4. *See Stockett v.*

Ass'n of Cal. Water Agencies Joint Powers Ins. Auth., 99 P.3d 500, 501, 505 (Cal. 2004).

New Hampshire has also recognized a cause of action for wrongful termination in violation of public policy. *See Bourque v. Town of Bow*, 736 F. Supp. 398, 403 (D.N.H. 1990). In *Bourque*, the district court allowed a former town employee to proceed with his claim for wrongful termination against the town, explaining that "[i]f, as plaintiff contends, his discharge was politically motivated, public policy is implicated." *Id.* at 403. The court allowed the plaintiff to proceed to trial to prove that he was wrongfully terminated in violation of public policy based on "his failure to provide political support" to a town official running for selectman. *Id.*

Similarly, in Missouri, employees can bring a claim for breach of the implied covenant of good faith and fair dealing based on violation of public policy. *Kmak v. Am. Century Cos.*, 754 F.3d 513, 516-17 (8th Cir. 2014). While not yet considered by the Missouri Supreme Court, a federal district court recently construed Missouri law to permit a municipal employee to bring such an action against the city, despite Missouri's sovereign immunity law barring tort actions, including wrongful discharge, against the state and municipalities. *Smith v. City of Byrnes Mill,* No. 4:14-1220, 2015 U.S. Dist.

LEXIS 103711, at *15-16 (E.D. Mo. Aug. 7, 2015). The court reasoned that "[a]llowing this cause of action gives effect to the implied covenant of good faith and fair dealing that is present in every Missouri contract," as well as "promot[ing] the public policy interest of not permitting city employers 'to discharge employees, without consequence, for doing that which is beneficial to society, while not interfering with the Missouri legislature's decision to protect cities from tort suits through the sovereign immunity statute.'" *Id.* (internal citation omitted).

Courts acknowledge that the public policy exception to the at-will employment doctrine is available in those instances when no other remedies – statutory or otherwise – are available. *See, e.g., Epps v. Clarendon Cnty.*, 405 S.E.2d 386, 387 (S.C. 1991) (recognizing public policy exception to at-will employee doctrine but declining to extend exception where alternative remedy existed for infringed right). The relative infrequency with which public employees resort to this remedy lends further support to *Amici's* position that a safety net of state and federal statutory remedies protecting public employees are already in place and more than sufficient to guard against unjust adverse employment actions.

With both statutory and common-law protections available, expansion of the First Amendment is not only unnecessary but unwise. It would subject government employers to suffocating judicial oversight, "impermissibly 'constitutionaliz[ing] the employee grievance.'" *Enquist v. Oregon Dep't of Agric.*, 553 U.S. 519, 609 (2008) (quoting *Connick v. Myers*, 461 U.S. 138, 154 (1983)); *cf. Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2496 (2011) ("Unrestrained application of the Petition Clause in the context of government employment would subject a wide range of government operations to invasive judicial superintendence. Employees may file grievances on a variety of employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations. Every government action in response could present a potential federal constitutional issue. . . . It would also consume the time and attention of public officials, burden the exercise of legitimate authority, and blur the lines of accountability between officials and the public.") (citation omitted). The Court should, once again, be guided by "the 'common-sense realization that government offices could not function if every employment decision became a constitutional matter.'" *Enquist*, 553 U.S. at 607 (quoting *Connick*, 461 U.S. at 143). The Court should affirm the Third Circuit's decision.

II. A GOVERNMENT EMPLOYEE'S ABILITY TO ENGAGE IN POLITICAL ACTIVITY IS NOT WITHOUT LIMIT.

In certain circumstances, a governmental entity may restrict its employees from engaging in political activity. In *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973), this Court recognized as much when it held that the Hatch Act's provision forbidding federal employees to "tak[e] an active part in political management or in political campaigns" did not violate the First Amendment's guarantee of free speech. *Id.* at 554, 556. Specifically, the Court held that it

> unhesitatingly reaffirm[ed] the *[United Public Workers v.] Mitchell* holding that Congress had, and has, the power to prevent [government employees] from holding a party office, working at the polls, and acting as party paymaster for other party workers. . . So would [an Act of Congress be valid] if, in plain and understandable language, the statute forbade activities such as organizing a political party or club; actively participating in fund-raising activities for a partisan candidate or political party; becoming a partisan candidate for, or campaigning for, an elective public office; actively

> managing the campaign of a partisan candidate for public office; initiating or circulating a partisan nominating petition or soliciting votes for a partisan candidate for public office; or serving as a delegate, alternate, or proxy to a political party convention. Our judgment is that neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees.

Id. at 558 (citing *Mitchell*, 330 U.S. 75). The Court "agreed . . . that plainly identifiable acts of political management and political campaigning on the part of federal employees may constitutionally be prohibited." *Id.* at 567. Similarly, in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the Court upheld the constitutionality of an Oklahoma statute containing political restrictions on classified state employees engaged in partisan political activity. *Id.* at 610.

Neither that Oklahoma statute (now repealed) nor the Hatch Act, 5 U.S.C. §§ 7321-7326, is directly applicable to this case;[4] howev-

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[4] The Hatch Act limits certain political activities of most executive branch employees, such as engaging in political

er, the general principles animating those precedents remain relevant.[5]

Moreover, in *Elrod v. Burns*, 427 U.S. 347 (1976), this Court "suggested that policymaking and confidential employees probably could be dismissed on the basis of their political views," and in *Branti v. Finkel*, 445 U.S. 507 (1980), it said that "a State demonstrates a compelling interest in infringing First Amendment rights only when it can show that 'party affiliation is an appropriate requirement for the effective performance of the public office involved.'" *Rutan v. Republican Party*, 497 U.S. 62, 64 n.5 (1990)

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activity while on duty or in the federal workplace, or soliciting or receiving political contributions.

[5] History is relevant as well. *See* EDMUND MORRIS, THE RISE OF THEODORE ROOSEVELT 529 (1979) (noting Theodore Roosevelt's refusal, as President of the New York City Police Commission, to change course with respect to the police department's strict enforcement of the Sunday closing laws) ("Personally, I think I can best serve the Republican party *by taking the police force absolutely out of politics*. Our duty is to preserve order, to protect life and property, to arrest criminals and to secure honest elections.") (emphasis added). Like Roosevelt, the Chief of Police's goal was to promote fair elections by requiring that those in his inner circle forbear from active political involvement. This goal does not threaten the First Amendment.

(citing *Elrod*, 427 U.S. at 367 and *Branti*, 445 U.S. at 518). The Court then extended the *Elrod-Branti* holding to apply to promotions, transfers, and recalls after layoffs based on political affiliation. *Rutan*, 497 U.S. at 75.

A portion of the Court dissented, stating that "[s]ince the government may dismiss an employee for political *speech* 'reasonably deemed by Congress to interfere with the efficiency of the public service,' *[United] Public Workers v. Mitchell*, [330 U.S. 75, 101 (1947)], it follows, *a fortiori*, that the government may dismiss an employee for political *affiliation* if 'reasonably necessary to promote effective government.'" *Rutan*, 497 U.S. at 100 (Scalia, J., dissenting) (citing *Brown v. Glines*, 444 U.S. 348, 356 n.13 (1980)) (emphasis in original). Concerned about the "shambles" produced by *Elrod* and *Branti*, the dissent used the following example: "A city cannot fire a deputy sheriff because of his political affiliation, but then again perhaps it can, especially if he is called the 'police captain.'" *Id.* at 111 (citing *Jones v. Dodson*, 727 F.2d 1329, 1338 (4th Cir. 1984); *McBee v. Jim Hogg County*, 730 F.2d 1009, 1014-15 (5th Cir. 1984) (*en banc*); *Joyner v. Lancaster*, 553 F Supp. 809, 818 (M.D.N.C. 1982), *later proceeding*, 815 F.2d 20, 24 (4th Cir. 1987)).

Seeking further specificity, the lower courts have held that the *Elrod-Branti-Rutan* line of cases applies not only to government employees who are policymakers, but also to government employees whose positions "require a '*heightened need for trust and confidence* that . . . subordinates are guided by the same political compass and will exercise their discretion in a manner consistent with their shared political agenda.'" *Embry v. City of Calumet City*, 701 F.3d 231, 235 (7th Cir. 2012) (emphasis added) (citation omitted); *see also Gregorich v. Lund*, 54 F.3d 410, 417-18 (7th Cir. 1995).

Specifically, these courts have held that "[p]olitical allegiance is also a valid job requirement when the job 'gives the holder access to his political superiors' confidential, politically sensitive thoughts.'" *Embry*, 701 F.3d at 236 n.1 (citations omitted); *see also Peterson v. Dean*, 777 F.3d 334, 342 (6th Cir. 2015) (discussing one of four categories of positions that fall "with reasonable certainty" under the *Elrod-Branti* exception as "*confidential advisors* who spend a significant portion of their time on the job advising category one or category two position-holders on how to exercise their statutory or delegated policymaking authority, *or other confidential employees who control the lines of communications* to category one positions

[named in relevant law as those to whom discretionary authority regarding the enforcement of that law or carrying out of some policy of political concern is granted], category two positions [those to whom a significant portion of total discretionary authority available to category one positions has been delegated] or confidential advisors") (emphases added); *Bland v. ACLU*, 730 F.3d 368, 375 (4th Cir. 2013) (describing process of "examin[ing] the particular responsibilities of the position to determine whether it resembles a policy-maker, *a privy to confidential information*, a communicator, or some other office holder whose function is such that party affiliation [or political allegiance] is an equally appropriate requirement.") (emphasis added).

The Sixth Circuit has described "category three" as "formulated to comport with the discussion in *Branti* indicating that a state governor may 'believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments.'" *Peterson*, 777 F.3d at 349 (quoting *Branti*, 445 U.S. at 518) (citation omitted). This category, the Sixth Circuit continued, "is concerned with this type of employee's access to confidential, political infor-

mation transmitted to the policymaker, which requires political loyalty." *Peterson*, 777 F.3d at 349 (citation omitted); *see also Soderstrum v. Town of Grand Isle*, 925 F.2d 135, 140 (5th Cir. 1991) (Chief of Police's secretary was a "confidential" employee such that her termination did not violate the First Amendment because she "served in a position of confidence requiring complete loyalty to the police chief . . . did his typing and filing, and was privy to certain confidential files and documents."); *Balogh v. Charron*, 855 F.2d 356, 356 (6th Cir. 1988) (bailiff to judge was a "confidential" employee because he "handle[d] sensitive communications for the judge . . . about cases of a confidential matter, information which is not public information.").

The record evidence on appeal demonstrates Heffernan fell into this category, such that even if an actual rather than a perceived First Amendment violation was at issue, the adverse employment action taken against him would not have violated the First Amendment.

Indeed, Chief of Police James Wittig testified that the "average patrolman" could go out and engage in political activity, but that Heffernan was "held to a higher standard" because he worked in the Chief's Office. *Heffernan v. City of Paterson*, No. 14-1610 (3d Cir.), Joint App., A-

0636-0637. He was one of four officers in the Chief's Office. *Id.*, A-0650. The Chief of Police Wittig "hand-picked" Heffernan to work in his office because of the confidential work his office does. *Id.*, A-0691, A-0686.

The Chief of Police also testified that confidential mail came in from citizens to his office and that Heffernan would open and process this confidential mail on occasion. *Id.*, A-0687-688. Heffernan also had access to the confidential files, including personnel records of officers, confidential letters, communications from the prosecutor's office or attorney general, and access to the computer system. *Id.*, A-0688-0689, A-0693, A-0696. He had access to a security door to get into the Chief's Office, and he sat in the Chief's Outer Office with the Chief's confidential secretary and executive officer, approximately eight feet away from the Chief's private office. *Id.*, A-0691, A-0695-0696, A-0698.

Heffernan also had access to officers' salaries and other confidential information. *Id.*, A-0697. Chief of Police Wittig explained that when it came to the officers assigned to the Chief's Office, "confidentiality in each officer is a must. . . . When I brought Jeffrey down to my office, Chief of Police, I held Jeffrey to a higher standard than any other officer." *Id.*, A-0701. As to why he reassigned Heffernan, the Chief

testified, "He's the first detective that I brought back down into my office after I became chief. I expected more in Jeffrey. Jeffrey disappointed me. He violated my trust. I felt I couldn't trust him no more. If at that point I couldn't trust him, I couldn't have him work in my office. That's why I reassigned him." *Id.*, A-0701-0702.

Although the Courts of Appeals have, at times, regarded the confidential nature of a position as sufficient to place a government employee under the *Elrod-Branti-Rutan* exception, this Court's pronouncement in *Branti* articulated "the ultimate inquiry" not as "whether the label 'policymaker' or confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation [or political allegiance] is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518.[6] *Amici*'s position is that a government employer

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[6] At least one lower court has "acknowledged . that 'because Justice Stevens specifically addressed whether an assistant public defender was a 'policymaking' and/or 'confidential' employee, and concluded that the answer to each question was no, there is disagreement in the legal academy about whether the language in *Branti* purporting to substantively reformulate the *Elrod* standard is dicta.'" *Ezell v. Wynn*, 802 F.3d 1217, 1224 n.8 (11th Cir. 2015) (citation omitted).

should be able to require political allegiance from a deeply trusted employee like Heffernan with access to his confidential files, correspondence, and other sensitive materials, because the Chief of Police would be unable to carry out his duties absent assurance that his deputy is entirely loyal and trustworthy. Such a clarification of the *Elrod-Branti-Rutan* exception is sensible and warranted.

In any event, regardless of whether the Court determines that the adverse action taken against Heffernan falls outside the *Elrod-Branti-Rutan* exception, the fact is that that no First-Amendment-protected conduct occurred in this case; there is no "there" there. *See* GERTRUDE STEIN, EVERYBODY'S AUTOBIOGRAPHY 289 (1937). The Court should resist Petitioner's invitation to contort First Amendment doctrine such that Petitioner can recover for the "deprivation" of a right he never exercised.

CONCLUSION

For the foregoing reasons, and for the reasons contained in Respondents' brief, the decision of the court below should be affirmed.

Respectfully submitted,

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